83-1950

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JEAN MCALLISTER and
JUDITH E. KLINE, D.O.,
Petitioners,

v.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE SECOND DISTRICT

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QUESTION PRESENTED

In a case brought under the Equal Credit Opportunity Act, when plaintiffs prove that a lending institution based its decision to deny them a loan on an impermissible consideration—plaintiffs' marital status—does the lending institution then bear the burden of proving that the loan would have been denied even if plaintiffs' marital status had not been taken into account?

LIST OF PARTIES

During the proceedings in the trial court, the Respondent merged into another financial institution, and by order of the trial court the Respondent was then designated as "Florida Federal Savings and Loan Association into which Gulf Federal Savings and Loan Association has merged." Because both the trial court and appellate court continued to caption the parties as originally named, Respondent is so captioned herein.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE SECOND DISTRICT

Mary Jean McAllister and Judith E. Kline, D.O. respectfully petition this Court for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida for the Second District entered in this cause on February 1, 1984.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida for the Second District is not officially reported and is reprinted as Appendix A to this petition. The opinion and final judgment of the Circuit Court for Pinellas County, Florida, is not officially reported and is reprinted as Appendix B to this petition.

JURISDICTION

The opinion of the District Court of Appeal of Florida for the Second District was entered February 1, 1984 (App. A), *per curiam* affirming the final judgment of the Circuit Court for Pinellas County, Florida (App. B). The Supreme Court of Florida lacked jurisdiction to review the opinion of the District Court of Appeal. See Article V, § 3(b), Florida Constitution (1980); and, Florida Rule of Appellate Procedure 9.030(a). Therefore, the District Court of Appeal was the highest court in Florida in which a decision could be had. On April 20, 1984, Justice Powell signed an order extending the time for filing a petition for writ of certiorari to and including May 31, 1984 (reprinted as Appendix D to this petition). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

STATUTE INVOLVED

The pertinent provision of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f is as follows:

> 15 U.S.C. § 1691(a):
>
> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction
>
> > (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).

STATEMENT OF THE CASE

A. Introduction

This is an action brought under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.* The Federal question was first raised in a complaint filed in the trial court wherein Petitioners sued Respondent under ECOA alleging, *inter alia*, discrimination based on marital status and sex. Said complaint is reprinted as

Appendix C to this petition. In entering judgment against Petitioners, the trial court specifically interpreted and construed ECOA (App. B). Petitioners argued in the appellate court that the trial court misallocated the burden of proof under ECOA. Pertinent provisions of Petitioners' initial brief to the District Court of Appeal are cited in this petition *infra* at 8. The appellate court passed upon these matters by affirming the judgment of the trial court without explanation (App. A).

B. The Facts [1]

In December, 1977, Mary Jean McAllister and Judith E. Kline, D.O. (hereinafter "Petitioners"), contracted with a developer to purchase a unique investment and vacation condominium at South Seas Plantation, Captiva Island, Florida. At this time Respondent, Gulf Federal Savings and Loan Association (hereinafter "the Bank"), had contracted with the developer to provide $7,500,000.00 in end-loan mortgage financing to assist purchasers at South Seas Plantation.

Petitioners thereupon submitted one joint application to the Bank for an 80% mortgage loan to purchase the condominium.[2] The Bank returned Petitioners' application requesting separate applications. The Bank's policy required separate applications for co-applicants not married to each other and one joint application for a married couple. Petitioners then submitted separate application forms.

In evaluating loan applications, the Bank computed a percentage ratio of an applicant's total debt to total in-

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[1] The statement of the facts is based on the specific factual findings of the trial court as contained in its final judgment (App. B). Certain additional record references are made.

[2] Petitioners, applying for a mortgage of $51,100.00, had a combined net worth of $201,467.00 including $61,894.00 cash in the bank. Record below at 444-445, 448-449.

come. The Bank utilized this "income-to-debt" [3] ratio as one of the major determining factors in deciding upon a loan. This ratio is computed on the Bank's loan analysis sheet which summarizes an applicant's financial data.

The Bank prepared a separate loan analysis sheet for each Petitioner and charged each with the full amount of their shared obligations. In doing this, each was charged the full amount of a $450.00 monthly mortgage payment they shared on their co-owned residence, and each was also charged $432.00 which was the full amount of the monthly payment on the debt applied for. This double-counting by the Bank resulted in individual income-to-debt ratios of 54% for Petitioner Kline and 74% for Petitioner McAllister. The Bank did not perform a combined analysis of Petitioners' finances; had it done so, their combined income-to-debt ratio would have been 47%.[4]

Upon being informed that the Bank denied their loan, Petitioner McAllister spoke with the Bank's Vice-President in charge of mortgage lending who admitted a combined analysis was not performed and stated that one of the co-applicants would have to qualify individually in order for the loan to be granted.[5] Due to the loan denial, Petitioners were unable to purchase the condominium.[6]

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[3] While this ratio is, in fact, one of debt-to-income, the trial court and all parties referred to it as an "income-to-debt" ratio, said terminology continued herein for consistency.

[4] In contrast, the Bank computed combined income-to-debt ratios for co-applicants married to each other. Because the Bank permitted married couples to file one joint application and financial statement, one joint analysis sheet was prepared for that applicant class upon which a combined income-to-debt ratio was computed. Had Petitioners been married to each other and therefore permitted to submit one joint application and financial statement, they also would have had their finances evaluated on a combined basis. Record below at 466-467; record supplement below at 8-9 and 11.

[5] App. 4a; record below at 875-876.

[6] By the time of trial herein, the condominium had increased in value approximately $96,000.00 (App. 6a).

Petitioners then filed suit against the Bank in the Circuit Court for Pinellas County, Florida, for discrimination under ECOA based on marital status and sex (App. C).

At non-jury trial, both parties introduced extensive evidence whether petitioners would have been eligible for the loan had the Bank treated them as having a combined income-to-debt ratio of 47%. Despite evidence that the industry norm was 33%, Petitioners introduced numerous documents of the Bank indicating that its income-to-debt guideline was 50%.[7] The Bank's President testified that the policy of the association's board of directors was that the income-to-debt ratio not exceed 50%.[8] In fact the President, when asked, could not articulate why Petitioners' loan would not be granted with a combined 47% income-to-debt ratio.[9] On the other hand, two bank employees who sat on the loan committee evaluating Petitioners' application testified that they only considered loans with income-to-debt ratios of 33% or less. Evidence was introduced that the Bank in fact made loans above 33% income-to-debt ratio.

C. Decisions Below

The trial court specifically found that the Bank did not perform a combined analysis of Petitioners' finances (App. 4a), and based upon *Markham v. Colonial Mortgage Service Co., Associates*, 605 F.2d 566 (D.C. Cir.

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[7] The Bank's President, in a letter to the Federal Home Loan Bank Board, stated: "The association's policy is that . . . the income-to-total debt ratio should not normally exceed 50%." App. 4a; record below at 454.

[8] Record below at 1387-1388.

[9] "Q: You're saying that now you know of no reason in McAllister's and Kline's application which would cause the Bank to deny their loan, assuming their income-to-debt ratio was 47%?

A: No, I don't know of any reason why we shouldn't." Record below at 1434.

1979), determined that such a failure would violate ECOA (App. 7a).[10]

The trial court then framed what it considered to be the material issue in the case, whether Petitioners should have received the loan had a combined analysis been performed (App. 8a):

> "The material issue here is whether Plaintiffs were denied credit because the Defendants failed to aggregate their financial data thus bringing Plaintiffs into a position of meeting Gulf Federal guidelines for a loan, as required by E.C.O.A. and this failure was the cause because Plaintiffs would otherwise have qualified."

The trial court placed the burden of proving this material issue on Petitioners (App. 9a):

> "The court interprets the legal obligation to combine an analysis under E.C.O.A. to mean that *if a person can show* they would be entitled to a loan when their finances are combined . . . then the failure [to obtain a loan] would result from discrimination and not other factors." Emphasis added.

In resolving this issue, the court recited the evidence and specifically found that the Bank made loans above the 33% income-to-debt ratio although there was no showing it regularly did so (App. 8a-9a). The court concluded that it was necessary to know what policies and guidelines the Bank used to qualify loans in the 33%-50% income-to-debt category. The court placed upon Petitioners the burden of establishing such criteria and then concluded Petitioners failed to meet this burden (App. 9a):

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[10] In *Markham*, the Court held that when a creditor fails to aggregate the incomes of two unmarried joint mortgage applicants when determining their creditworthiness, but would have done so had they been married to each other, this is "precisely the sort of discrimination prohibited by [ECOA] § 1691(a) on its face." *Id.* at 569.

> "*Petitioners have the burden of showing* what the eligibility for a loan above 33% income-to-debt ratio would be . . . The Court finds, this must be established before Plaintiffs can say they were entitled to a loan with an income-to-debt ratio under a combined analysis of 47%. Without showing such an established criteria, Plaintiffs are unable to prove that the denial of the loan was because of a failure to give them the benefit of a combined analysis . . . The court concludes that Plaintiffs have failed to show that had their finances been aggregated, they would have met the guidelines of the Defendant." Emphasis added.

As mentioned *supra*, the appellate court *per curiam* affirmed the trial court's judgment without comment.

REASONS FOR GRANTING THE WRIT

Resolution of the question presented in this petition is critical to the proper adjudication of cases under the Equal Credit Opportunity Act of 1974, as amended in 1976 ("ECOA"). The result reached by the courts below on this question is contrary to the result reached by this Court in resolving the analogous question in the context of constitutional adjudication. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). This Court has never decided whether the allocation of the burden of proof set forth in *Mt. Healthy* is applicable to cases brought under ECOA or, indeed, under the whole range of other federal anti-discrimination statutes where the same question commonly recurs. The lower court decisions under these various statutes are far from uniform, and this case presents an appropriate occasion for this Court to settle the issue.

In this case, petitioners proved that respondent had based its decision to deny petitioners a loan on petitioners' marital status, an impermissible factor under ECOA. The lower courts then confronted the question

whether respondent would have reached the same decision even if it had not taken that impermissible factor into account. Ruling that petitioners had the burden of proof on that question, and finding the evidence on the issue to be equivocal and insufficient to carry petitioners' burden, the courts below held that respondent could not be found to have violated ECOA.

The allocation of the burden of proof on this issue—whether a defendant that has acted on an illegal basis would have taken the same action even without the illegal premise—is central to the adjudication of cases under ECOA. A lending institution's loan criteria are commonly, as here, highly subjective and discretionary. Requiring the plaintiff to prove how the defendant's personnel would have applied those criteria, on the hypothetical assumption that the impermissible factor were removed from consideration, could lead as a practical matter to evisceration of the rights that ECOA was intended to create.[11]

This Court, in *Mt. Healthy*, faced an analogous issue in the context of a claim by a public employee that he had been discharged in violation of his rights under the First Amendment to the Constitution. This Court ruled that once the public employee proved that the impermissible factor played a substantial part in the decision that was in fact made, the defendant public employer then had the burden of proving that it would have made the same decision absent the impermissible reason. *Id.* at 286-287.

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[11] When asked what the Bank's lending criteria were in the 33%-50% income-to-debt ratio, the Bank's President could only state that "good and solid" loans were made in that category (App. 8a). As Petitioners stated to the Florida District Court of Appeal in their initial brief (at 21):

> "How then could a Plaintiff even if required to do so, prove a standard which Defendant itself was unable to describe? Such a burden would be impossible and to hold a Plaintiff under ECOA to such a standard eviscerates the statute and makes any remedy thereunder virtually worthless."

The principle of *Mt. Healthy* would appear to be equally applicable when a defendant has taken into account a factor that is impermissible under an anti-discrimination statute. But this Court has never had occasion to so decide.[12] And, as the decision below indicates, the lower courts have not uniformly applied the *Mt. Healthy* rule in cases under the federal anti-discrimination statutes. In addition to the result below in the instant case, a number of other courts, in employment cases, have placed upon the plaintiff the burden of proving that " 'but for' his employer's motive to discrimi-

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[12] In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403-404 n.9 (1977), this Court in *dictum* indicated that the *Mt. Healthy* allocation of proof would be applicable to a claim under Title VII of the Civil Rights Act of 1964. But the Court gave the contrary indication in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (plaintiff must show that race was "a 'but for' cause").

In *NLRB v. National Transportation Management Corp.*, —— U.S. ——, 103 S.Ct. 2469 (1983), this Court determined that the National Labor Relations Board could reasonably construe the National Labor Relations Act to place on the employer, as an affirmative defense, the burden of proving that the same action would have been taken without regard to the statutorily forbidden motivation. The Court explained the reasonableness of such a construction (*id.* at 2475):

> "The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because the risk was created not by innocent activity but by his own wrongdoing."

But the Court also indicated that the Board could have properly construed the Act otherwise (*id.* at 2474-2475):

> "We assume that the Board could reasonably have construed the Act [to place on the General Counsel the burden of proving what would have happened absent the improper factor]. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer."

nate against him . . . he would not have been discharged." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979). See also, *e.g.*, *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984 (9th Cir. 1981); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980). Even when courts place upon the employer the burden of proving it would have made the same decision absent the illegitimate factor, the courts are not in agreement whether such a claim is properly treated as an affirmative defense to a finding of violation or as a means to avoid a particular remedy once a violation is found. Compare, *e.g.*, *Smallwood v. United Air Lines*, —— F.2d ——, 34 FEP Cases 217, 222 (4th Cir., February 28, 1984), with *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556-1557 (11th Cir. 1983); *cf.*, *Transportation Management*, quoted at note 12, *supra*. This latter point may be of great significance in a case such as the instant one where the plaintiffs seek not only consequential damages for failure to receive the loan but also damages for humiliation and emotional anguish resulting from their discriminatory treatment by the defendant.

The confusion of the lower courts as to the applicability of the *Mt. Healthy* allocation of proof to statutory anti-discrimination claims needs to be addressed. This case presents the issue in the context of a claim of discrimination under ECOA. Resolution of the issue here would not only resolve a critical open issue under ECOA, but also, because the structure of ECOA parallels that of other federal anti-discrimination statutes, would have much broader significance. This case therefore merits plenary consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Case No. 83-469

MARY JEAN MCALLISTER and JUDITH E. KLINE, D.O.,
Appellants,

v.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION,
Appellee.

Opinion filed February 1, 1984

Appeal from the Circuit Court for Pinellas County; James B. Sanderlin, Judge.

George J. Felos of Felos & Felos, Dunedin, and William A. Fleck of Cohen, Scherer & Cohn, P.A., Lake Worth, for Appellants.

William Gray Dunlap, Jr. and John M. Breckenridge, Jr. of Jacobs, Robbins, Gaynor, Burton, Hamps, Burns, Cole & Shasteen, P.A., Tampa, for Appellee.

PER CURIAM. Affirmed.

OTT, C.J., and DANAHY and CAMPBELL, JJ., Concur.

APPENDIX B

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA
IN AND FOR PINELLAS COUNTY

Circuit Civil No. 80-5115-13

MARY JEAN MCALLISTER and JUDITH E. KLINE, D.O.,
Plaintiffs,

vs.

GULF FEDERAL SAVINGS & LOAN ASSOCIATION,
Defendant.

FINAL JUDGMENT

Plaintiffs Mary Jean McAllister and Judith S. Kline, D.O. were attending a medical seminar at South Seas Plantation for three days in December, 1977. South Seas Plantation is an island community on Captiva Island, Florida, in the Gulf of Mexico off Fort Myers, Florida. It was developed by Mariner Properties, and has come to be a valued resort, both for those seeking a vacation place as well as an investment. While at South Seas Plantation, the Plaintiffs took a tour of the community and found a condominium they were interested in purchasing, for an investment as well as a vacation property for themselves. During this time, Gulf Federal Savings & Loan Association, the Defendant, had a contract with Mariner Properties, the developer, a $7,500,000.00 end-loan commitment at South Seas Planation to assist purchasers in obtaining mortgage financing for the condominium sales. The contract was in effect in December of 1977 and Gulf Federal was extending loans as mortgage financing under this contract.

V.I.P. Realty was the Sales Agent for Mariner Properties. Plaintiffs met with Louis Gravis of V.I.P. Realty, who showed them the one remaining unit in the Beach Villa Project for purchase on a pre-construction basis. He also told them financing would be available through a local bank. Mr. Gravis drew up a contract for the purchase by Plaintiffs of Beach Villa Unit G-107 for a purchase price of SIXTY-THREE THOUSAND ($63,000.00) DOLLARS. Plaintiff McAllister gave V.I.P. a deposit check in the amount of THREE THOUSAND ONE HUNDRED NINETY-FIVE ($3,195.00) DOLLARS and a purchase agreement was executed between Plaintiffs and South Seas Plantation Company. The purchase agreement required the Plaintiffs to increase their deposit to an amount that would be twenty (20%) per cent of the purchase price. Plaintiffs had adequate funds to meet this requirement. The agreement was made contingent upon the purchasers obtaining a first mortgage commitment for eighty (80%) per cent of the purchase price. During this time, V.I.P. Realty was the exclusive agent for Mariner Properties. Mary Smith, an employee of V.I.P. had the responsibility of providing loan applications from lending institutions to purchasers. In accordance with policies as she understood them, she sent Plaintiffs each an application for them to complete separately. The Defendant's policy was to require separate applications for two persons not married and one application for a married couple.

The Plaintiffs completed one application jointly and sent it to V.I.P. with a check for FIFTY-SIX ($56.00) DOLLARS. The application was reviewed and passed on to Gulf Federal Savings and Loan. A loan officer then wrote Mrs. McAllister returning her check and the joint application, and enclosing two application forms. The loan officer informed them that the applications had to be completed separately as they were going to process them separately for her and Dr. Kline. Plaintiffs completed separate application forms and returned them to Defendant.

Defendant received the applications and proceeded to process them. A loan analysis sheet was prepared for each financial statement submitted. This sheet summarizes data contained in the loan application and enables the computation of income-to-debt ratios. In doing this, each Plaintiff was charged with a FOUR HUNDRED FIFTY ($450.-0) DOLLAR monthly mortgage payment which Plaintiffs shared on their co-owned residence. Plaintiffs were also each charged FOUR HUNDRED THIRTY-TWO ($432.00) DOLLARS which was the full amount of the debt applied for. This resulted in Plaintiff Kline being computed to have an income-to-debt ratio of Fifty-Four (54%) per cent and Plaintiff McAllister a ratio of Seventy-Four (74%) per cent. Defendant did not perform a combined analysis, for had it done so, their combined income-to-debt ratio would have been Forty-Seven (47%) per cent. Defendant then informed Plaintiffs that the loan had been denied because their guidelines had been exceeded. Plaintiff McAllister called Merlin Houck, Defendant's Vice President in charge of lending, who also was a member of the loan committee denying Plaintiffs' applications. Ms. McAllister was told by Mr. Houck that a combined analysis was not performed.

Plaintiffs, upon the loan denial, filed a discrimination complaint with the Federal Home Loan Bank Board against defendants. This complaint was based on Defendant's failure to give them consideration on a combined income—analysis basis. The Supervisory Agent of the Board wrote Mr. Bobby Williams, President of Gulf Federal informing him of the complaint and the grounds upon which it was made and requesting documents forming the basis for the bank's decision. Mr. Williams replied, stating that Gulf Federal's policy on mortgage loans required an income-to-payment ratio normally not to exceed Twenty-Five (25%) per cent and an income-to-total debt ratio normally not to exceed Fifty (50%) per cent. He further stated that their policy was to do a combined

analysis where there were two persons not married to each other.

The Federal Loan Bank Board conducted an investigation and after reviewing all of Gulf Federal's supporting documents and discussions with its personnel, the Board was not satisfied that the denial was purely for economic reasons. They found many errors in the analysis, and concluded that Gulf Federal had policies that discriminated against persons who were not married to each other, and recommended various changes in their lending procedures and analysis. Subsequently, the Board of Gulf Federal instructed their President to solicit another loan application from the applicants, refund all fees or charges incurred in the application and to meet with the applicants and attempt a resolution of the matter. This Mr. Williams did, but Plaintiffs did not reapply.

The Board continued to request additional data from Gulf Federal to enable them to review loans they had made and denied, when persons filed jointly, married and unmarried. The Home Loan Board finally concluded that "it is our preliminary plan to make a finding that the denial of the Kline and McAllister loan was not on a discriminatory basis, but rather a result of a weak procedure which left room for clerical error." The Federal Home Loan Bank also notified Plaintiffs that they had made their finding and of the position they were taking. Plaintiffs then brought this action against Defendant, alledging they were denied a loan based on sex and marital status in violation of the Equal Credit Opportunity Act, negligence in the processing of their application, violation of Credit Reporting Act and breach of contract. The fact most crucial to the resolution of this conflict is the policy and criteria used in determining whether a loan is granted. The income-to-debt ratio is one of the major determining factors. All of the testimony from all bank personnel was that Thirty-Three (33%) per cent is the income-to-debt ratio standard in the industry. This is the

guideline that the Federal Home Loan Mortgage Corporation (Freddie Mac) uses for savings and loan associations seeking to sell residential mortgage loans to them. All of the lending institutions in the area of Defendant uses a Thirty-Three (33%) per cent guideline. This fact is conceded by Plaintiffs. The President of Gulf Federal represented to the Federal Home Loan Bank Board that their guidelines for lending went as high as Fifty (50%) per cent. Both parties concede that Gulf Federal was the only lending institution with guidelines as high as Fifty (50%) per cent and if Gulf Federal did not approve the loan, Plaintiffs would not be able to get financing at any other savings and loan or bank in the area. In fact, this is part of the gravamen of Plaintiffs' complaint. The higher guideline of Defendant would be the only way they could obtain financing for the condominium.

The loan committee of Gulf Federal said that they operated under guidelines of 33% because they had to make loans that would be saleable to Freddie Mac. In fact, the testimony was that that was the only guideline they ever used.

Plaintiffs introduced evidence from experts in the banking field that the procedures of a dual loan analysis was one so fraught with the possibility of error, that such procedures were negligent. The fact was also determined to be so by the Federal Home Loan Bank, as it could so easily result in a double counting of debt.

The evidence shows that the condominiums here involved rose in value from the December 1977 contract price of $63,900.00 and later contracted by owner in June 1978 and closed in November 1978 for $74,900.00, and resold in November 1980 for $116,000. Its value in February 1982 was appraised from $155,00. to $160,000. Further, there would have been rental profits of $979. Plaintiffs further offered evidence of humiliation they suffered from friends and colleagues as a result of being denied the mortgage financing.

LAW APPLICABLE

The Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq provides as follows:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of the credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status.

Florida likewise has § 725.67 (1973) which states:

> No person, as defined in § 1.01(3) shall discriminate against any person based on sex, marital status or race in the areas of loaning money, granting credit, or providing equal pay for equal services.

The issue of the failure to aggregate Plaintiffs' income as a violation of the Equal Credit Opportunity Act was addressed in the case of *Markham v. Colonial Mortgage Service Co. Associated*, 605 F.2d 566 (1979). Summary Judgment in favor of lending institution was reversed and remanded to the District Court to determine whether the Plaintiffs would qualify if their incomes were combined. The Court determined that failure to aggregate would be a violation of E.C.O.A. Further, that Plaintiffs do not have the burden of proving an "effects test" in a claim under E.C.O.A., because the "effects test" is not an exclusive test for discrimination. *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835 (1981).

Banks may be held liable for their negligent acts in the processing of loans, *Jones v. Central National Bank*, 148 So. 765, (Fla. 1933). "The Equal Credit Opportunity Act sounds basically in tort and creates a new legal duty for creditors", *Vander Missen v. Kellogg Citizens National Bank*, 83 F.K.D. 206 (E.D. Wis. 1979). To be actionable, there must be a clear relationship between the negligent act and the injury, that is, the negligent act must be shown to be the reason for the injury. "An actual causal connection between the negligent act and the injury is an

indespensable requirement of an action for negligence", 38 Fla. Jur. 2d. § 29, Page 45. For a negligent act to be the proximate cause of an injury, it must be an efficient cause, that is, the material and substantial factor in bringing the injury about. Ibid. § 33, pp. 53.

Findings and Conclusions:

Plaintiffs have brought this action in a four count complaint. They allege Defendants have discriminated against them based on sex and marital status in violation of the Equal Credit Opportunity Act. They also allege that the Defendants were negligent in the processing of their credit application resulting in their denial of mortgage financing. It is also alleged that Defendants breached a contract with them inasmuch as there was a loan-end-commitment by Defendant extended to seller for the benefit of seller's purchasers. A fourth count of a violation of the Fair Credit Reporting Act was dismissed at the close of testimony and the trial.

The material issue here is whether Plaintiffs were denied credit because the Defendants failed to aggregate their financial data thus bringing Plaintiffs into a position of meeting Gulf Federal guidelines for a loan, as required by E.C.O.A. and this failure was the cause because Plaintiffs would otherwise have qualified. The evidence is uncontroverted that the industry standard guideline for income-to-debt ratio is 33%. It is also clear, that Plaintiffs could not meet this guideline. There then remains the question of whether Gulf Federal had a higher income-to-debt ratio of 50% whereby under an aggregated financial analysis, the Plaintiffs would qualify. The president of Gulf Federal informed the Federal Home Loan Bank that they had an income-to-debt ratio of up to 50%. The president testified at trial that they did on occasion make loans on income-to-debt ratio of 50% under certain circumstances, "good and solid" as was characterized by Bobby Williams, President of Gulf Federal. The evidence does show that Gulf Federal has made loans above the

33% income-to-debt ratio. On the other hand, the members of the loan committee of Gulf Federal testified that at the time they considered Plaintiffs' application, their Board was only considering loans with an income-to-debt ratio of 33% and that they knew of no other policy or procedure. It therefore appears that loans above the 33% income-to-debt ratio is a special category of loans. It would be necessary to know what policies and guidelines are used to qualify in this category.

The Plaintiffs have not presented any evidence to establish this criteria for loans above the 33% and as a consequence, it is not known whether Plaintiffs would qualify for a loan where the income-to-debt ratio was up to 50%. Plaintiffs have the burden of showing what the eligibility for a loan above 33% income-to-debt ratio would be for there is no showing that Gulf Federal regularly made loans with an income-to-debt ratio above 33%. The Court finds, this must be established before Plaintiffs can say they were entitled to a loan with an income-to-debt ratio, under a combined analysis of 47%. Without showing such an established criteria, Plaintiffs are unable to prove that the denial of the loan was because of a failure to give them the benefit of a combined analysis. The Court interprets the legal obligation to combine an analysis under E.C.O.A. to mean that if a person can show they would be entitled to a loan when their finances are combined, and the failure to obtain a loan was a result of the refusal to combine finances, then the failure would result from discrimination and not other factors. The Court concludes that Plaintiffs have failed to show that had their finances been aggregated, they would have met the guidelines of the Defendant.

It has been well established and the Court finds as a fact that Gulf Federal was negligent in the processing of Plaintiffs' loan application. The issue therefore is, had Plaintiffs' application been properly processed, would they have been eligible for a loan. In order for the negligence

to enable Plaintiffs to recover for their injuries, they must prove that the negligence was the proximate cause of their injuries, that is, the material and substantial factor in bringing about the injury, so that it may be said, but for the negligence, Plaintiff would have received the loan, and would not have suffered the losses they have complained of. The Court concludes, that Plaintiffs have failed to prove, that had there been no negligence in the processing of their application they would have been within Gulf Federal's guidelines and would have therefore been entitled to the loan.

The Court further concludes that Plaintiffs' failure to show that under a proper treatment of their application, they would have received the loan, and therefore, the Court finds there was no breach of contract.

Judgment is hereby entered for Defendants. The Court retains jurisdiction to determine the question of costs, if any.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this 31st day of January, 1983.

/s/ James B. Sanderlin
JAMES B. SANDERLIN,
Circuit Judge

copies furnished:

William Gray Dunlap, Jr., Esquire
George J. Felos, Esquire
John M. Breckenridge, Esquire

APPENDIX C

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

Circuit Civil No. 80-5115-19

MARY JEAN McALLISTER and JUDITH E. KLINE, D.O.,
Plaintiffs,

vs.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendant.

COMPLAINT

COME NOW the Plaintiffs in the above cause, MARY JEAN McALLISTER and JUDITH E. KLINE, D.O., and sue the Defendant, GULF FEDERAL SAVINGS AND LOAN ASSOCIATION, and state:

COUNT I

1. Plaintiffs are residents of Pinellas County, Florida.

2. Defendant is a Federal Banking Association chartered under the Homeowners Loan Act.

3. This is an action for damages in excess of $2,500.00 and is brought pursuant to the Equal Credit Opportunity Act, Title 15, United States Code, Sections 1691-1691(f).

4. On or about December 4, 1977, Plaintiffs contracted with the South Seas Plantation Company for purchase of a unique piece of real property at Captiva Island, Lee County, Florida, more particularly described as:

UNIT NO. G-107, BEACH VILLA
CONDOMINIUM,
SOUTH SEAS PLANTATION, FLORIDA.

5. Plaintiffs paid $12,780.00 to South Seas Plantation Company as deposit toward the purchase price of said

real property. Plaintiffs intended to utilize said property for business and personal purposes.

6. Shortly after contracting with South Seas Plantation Company, Plaintiffs applied jointly to the Defendant for a loan in the amount of $51,000.00 to be secured by a mortgage on the aforesaid real property.

7. On or about May 17, 1978, Defendant denied Plaintiffs' request for said loan for the stated reason of "Present income insufficient for present obligations and mortgage requested."

8. Defendant intentionally discriminated against Plaintiffs in the abovementioned credit transaction (as set forth below), due to Plaintiffs' marital status:

A. During the time period in which Defendant considered Plaintiffs' loan request, the Defendant maintained certain procedures for evaluating the joint applications of persons married to each other, however, during said time, Defendant maintained different procedures for evaluating the joint applications of persons not married to each other.

B. Joint applicants married to each other were permitted to submit one (1) Financial Statement from which the Defendant prepared one (1) Analysis Sheet. However, joint applicants who were not married to each other were required to submit separate Financial Statements from which the Defendant prepared two (2) separate Analysis Sheets.

C. For each Analysis Sheet, Defendant computed a percentage figure described as "Income to Debt Ratio." In order to grant a loan request (of the nature involved in this action), Defendant required the income to debt ratio figure to be fifty (50%) percent or lower.

D. Unlike those for joint applicants married to each other, Plaintiffs' applications were considered individu-

ally, and Plaintiffs' assets and liabilities were not combined for computation of the income to debt ratio figure.

E. Had Defendant considered Plaintiffs' loan application in the manner in which Defendant considered joint applications of married individuals, Plaintiffs' loan request would have been granted.

9. As a direct and proximate result of the intentional discrimination of the Defendant, Plaintiffs have been damaged as follows:

A. Plaintiffs were unable to consummate the purchase of the aforesaid real property and have been deprived of the benefits of their bargain.

B. Plaintiffs have suffered embarrassment, humiliation and mental distress.

C. Plaintiffs' reputation for credit-worthiness has been harmed.

WHEREFORE, Plaintiffs pray that this Court enter judgment against Defendant for actual damages punitive damages, and for the costs and reasonable attorneys fees incurred by the Plaintiffs in this cause.

COUNT II

10. Plaintiffs restate the matters contained in Paragraphs 1-2, 4-9, 21-23 and 25-27 of this Complaint.

11. This is an action for damages in excess of $2,500.00.

12. Plaintiffs, during the time the aforementioned loan was requested from Defendant, were joint owners of a piece of real property in Pinellas County, Florida, commonly known as 2130 Cherry Street, St. Petersburg, Florida. At the time of said loan request, a mortgage lien of $51,000.00 existed on the Cherry Street property (for which Plaintiffs were jointly and individually liable).

13. Plaintiffs clearly stated on the application submitted to the Defendant for said loan that the 2130 Cherry Street property was co-owned by Plaintiffs.

14. Defendant, nevertheless, in preparing the Analysis Sheets and in computing the income to debt ratio for the Plaintiffs, considered each Plaintiff to owe $51,000.00 on the Cherry Street property, thereby, in effect, overstating Plaintiffs' indebtedness by $51,000.00.

15. Defendant, in preparing the Analysis Sheet and income to debt ratio for Plaintiff, JUDITH E. KLINE, D.O., considered debts of JUDITH E. KLINE, D.O., P.A.

16. Defendant failed to process Plaintiffs' loan request according to acceptable banking and commercial standards, and the above recited facts constitute negligence on the part of Defendant.

17. As a direct and proximate cause of Defendant's negligence, Plaintiffs have been damaged as follows:

A. Plaintiffs were unable to consummate purchase of the aforesaid real property and have been deprived of the benefits of their bargain.

B. Plaintiffs' reputation for credit-worthiness has been harmed.

WHEREFORE, Plaintiffs demand judgment against the Defendant for damages and the costs incurred in this cause.

COUNT III

18. Plaintiffs restate the matters contained in Paragraphs 1-2, 4, 6-9, 12-17 and 25-27 of this Complaint.

19. This is an action for damages in excess of $2,500.00 and is brought pursuant to the Fair Credit Reporting Act, Title 15, United States Code, Section 1681.

20. Plaintiffs paid $12,780.00 to South Seas Plantation Company as deposit toward the purchase price of said real property. Plaintiffs intended to utilize said property for personal purposes.

21. Upon Defendant's denial of Plaintiffs' loan request, Plaintiff, MARY JEAN McALLISTER, inquired of Defendant's employee, Merlin E. Houck, whether the liabilities of JUDITH E. KLINE, D.O., P.A., were considered in the evaluation of Plaintiffs' loan. Said employee of Defendant stated that he was unaware if said liabilities were so considered because the credit report did not differentiate between the liabilities of JUDITH E. KLINE, D.O., and JUDITH E. KLINE, D.O., P.A.

22. Plaintiffs' loan application was denied (wholly or partly) due to information contained in a Consumer Credit Report.

23. Defendant violated Title 15, United States Code, Section 1681m(a), by failing to supply to Plaintiffs the name and address of the consumer reporting agency which made the consumer report to the Defendant.

WHEREFORE, Plaintiffs demand judgment against the Defendant for damages, punitive damages, and Plaintiffs' costs and reasonable attorneys fees incurred in this cause.

COUNT IV

24. Plaintiffs restate the matters contained in Paragraphs 1-9, 12-17 and 21-23 of this Complaint.

25. The above recited actions of the Defendant, its agents, and employees, as concerns the Plaintiffs, and the entire course of conduct of Defendant, as regards the Plaintiffs, exhibit a degree of care substandard to that provided by Defendant to its customers of the male sex.

26. Defendant, its agents and employees, because of their invidious attitudes toward women (especially unmarried women involved in business transactions), failed to utilize, in evaluating Plaintiffs' loan application, the due care and unbiased consideration required of a banking institution, and more often provided to male customers.

27. Defendant has intentionally discriminated against Plaintiffs in the abovementioned credit transaction due to Plaintiffs' sex, and as a direct and proximate result of Defendant's discrimination, Plaintiffs have been damaged as follows:

A. Plaintiffs were unable to consummate the purchase of the aforesaid property and have been deprived of the benefits of their bargain.

B. Plaintiffs have suffered embarrassment, humiliation and mental distress.

C. Plaintiffs' reputation for credit-worthiness has been harmed.

WHEREFORE, Plaintiffs pray that this Court enter judgment against Defendant for actual damages, punitive damages, costs and attorneys fees; and that this Court do what is just and proper in the above cause.

/s/ Mary Jean McAllister

/s/ Judith E. Kline, D.O.

/s/ George J. Felos, Esq.
259 Fourth Avenue North
St. Petersburg, Florida 33701
Telephone (813) 822-6152
Attorney for Plaintiffs.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-846

MARY JEAN MCALLISTER AND JUDITH E. KLINE,
Petitioners,

v.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 31, 1984.

/s/ Lewis F. Powell
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of April, 1984.